THE HON'BLE SRI JUSTICE C.V. RAMULU

+W.P.No.15706 of 2007

%Dated 21-8-2007

Between:

IC-45069-W Lt.Col.Jai Prakash … Petitioner

and

The Union of India, through the
Secretary, Ministry of Defence,
Government of India,
New Delhi-110 011 & others … Respondents

!Counsel for the petitioner : SHRI VISHAL SAXENA

^Counsel for Respondents: SHRI A. RAJASEKHAR REDDY
Asst.Solicitor General of India

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> HEAD NOTE:

? Cases referred

1. AIR 1996 SC 3091
2. AIR 2001 SC 1772
3. Mil LJ 2004 Delhi 131
4. 2007(1) SLR 278

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Tuesday, 21st day of August,2007

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ORDER:

The short question that arises for consideration in this Writ Petition is whether trial by General Court Martial by issuing Proceedings in letter No.211031/ASA/JP/DV, dated 24-3-2007, by the 2nd respondent, is barred by limitation of 3 years as prescribed by Section 122 of the Army Act,1950 ?

Learned counsel for the petitioner stated that on the basis of a report dated 8-6-2004 stating that the petitioner has misused two railway warrants issued in the name of respondents 8 and 9 and also he misappropriated the imprest amount of Rs.13,000/- in the absence of the 9th respondent. This was the sum and substance of the charge against the petitioner. It is his contention that as soon as a report is made on 8-6-2004, the limitation of 3 years commences on that day and, therefore, order for assembling of General Court Martial on 24-5-2007 is barred by limitation. In support of his contentions, learned counsel relied upon the decisions in **RADHA KRISHAN v. UNION OF INDIA**[1] and **UNION OF INDIA v. HARJEET SINGH SANDHU**[2].

In **RADHA KRISHAN**'s case (1 supra), the Apex Court held as under:

> "7. Mr. Ramachandran first contended that one of the requisites to invoke the summary procedure envisaged under Rule 14 (2) to terminate the services of an officer by the Central Government in exercise of its powers under Section 19 of the Act is to obtain a satisfaction that his trial by a Court Marital is inexpedient or impracticable. Such a satisfaction, according to Mr. Ramachandran, can be arrived only at a time when trial by a Court Martial is permissible or possible. As in the instant case, admittedly, such a trial was barred by limitation under Section 122 of the Act the above Rule could not be invoked. We find much substance in the above contention of Mr. Ramachandran.
>
> 8. It is not in dispute that or (sic. at) the time the impugned notice was sent, no trial of the appellant by Court Martial could be held for sub-section (1) of Section 122 (as it then stood) clearly envisaged that it should not be commenced after expiration of three years from the date of commission of the offence which in the instance case was about 7 years prior to the issuance of the notice. Indeed, as seen earlier, in the notice itself it is stated that the trial had become time barred. When, the trial itself was legally impossible and impermeable the question to its being impracticable, in our view cannot or does not arise. 'Impracticability' is a concept different from 'impossibility' for while the latter is absolute, the former introduces at all events some degree of reason and involves some regard for practice. According to Western's Third New International Dictionary 'impracticable' means not practicable; incapable of being performed or accomplished by the means employed or at command. 'Impracticable' presuppose that the action is 'possible' but owing to certain practical difficulties or other reasons it is incapable of being performed. The same principle will equally apply to satisfy the test of 'inexpedient' as it means not expedient; disadvantageous in the circumstances inadvisable impolitic. It must therefore be held that so long as an Officer can be legally tried by a Court Martial the concerned authorities may, on the ground that such a trial is not impracticable or inexpedient, invoke Rule 14 (2). In other words, once the period of limitation of such a trial is over the authorities cannot take action under Rule 14 (2). While passing the impugned order the Division Bench however did not at all consider, while interpreting Rule 14 (2). the import of the words 'impracticable' or 'inexpedient' as appearing therein and proceeded on the basis that since Section 127 of the Act (since repealed) permitted trial even after a conviction or acquittal by a Court Martial, it necessarily meant that the Rule could be pressed into service even after the period of limitation. It

appears that in making the above observation the High Court did not notice that Section 127 relates to a trial by a 'Criminal Court' and not' Court Martial' and speaks of a stage after the trial by the latter is over."

In **UNION OF INDIA v. HARJEET SINGH SANDHU** (2 supra), it was held by the Apex Court as under:

> "34. The learned Additional Solicitor General cited a few examples wherein the trial by court martial may be rendered 'impracticable', to wit:- i) a misconduct amounting to an offence having been rendered not triable by court martial by expiration of the period of limitation prescribed by Section 122; ii) a court martial having been dissolved after its commencement on account of the number of officers required by the Act to validly constitute a court martial being reduced below the minimum or any other exigency contemplated by Section 117 occurring and the court martial cannot be convened to commence afresh on account of bar of limitation under Section 122 having come into play; (iii) The Central Government, the Chief of the Army Staff or any prescribed officer having annulled the proceedings of any court martial on the ground that they are illegal or unjust within the meaning of Section 165 of the Act and by that time the bar of limitation under Section 122 having come into play; (iv) Any finding or sentence of a court martial requiring confirmation having been ordered to be revised by order of the confirming authority but in spite of such revision having not been confirmed once again and a subsequent revision of finding or sentence being not contemplated by the provisions of the Act; rather a revision once only having been provided by Section 160; (v) A person subject to the provisions of Army Act having secured a stay order from a Court of law on commencement of court martial and by the time the stay order is vacated by the Court of law the bar of limitation provided by Section 122 coming into play."

Sri A. Rajasekhar Reddy, learned Assistant Solicitor General of India, appearing for the respondents, contended that it is not the date on which a report of intimation is made i.e. 8-6-2004 from which the limitation commences. In fact, the limitation commences after conducting a preliminary enquiry (Court of Inquiry) and the authority competent taking a decision to proceed further. The Court of Inquiry was ordered on 18-6-2004. Thereafter, the competent authority took a

decision for proceeding with the matter further, as per law, on 18-7-2005. As such, the limitation as required under Section 122 of the Army Act had commenced only on 18-7-2005. Admittedly, the General Court Martial was ordered to be assembled on 24-5-2007, which is within the period of limitation. Apart from this, the very Writ Petition is not maintainable in view of the availability of effective alternative remedy of 'plea in bar' as per Rule 53 of the Army Rules,1954. Instead of availing the said alternative remedy, the petitioner has approached this Court directly. In support of his contention, learned counsel relied upon a decision in **BRIG IQBAL SINGH v. UNION OF INDIA**[3]. Learned counsel also relied upon a Judgment reported in **A.S. DHILLON v. UNION OF INDIA**[4], wherein, a Division Bench of Punjab and Haryana High Court, while interpreting Section 122 of the Army Act and Rules 53 and 177 of Army Rules, held that in case, any proceedings under the Army Act are to be initiated on the basis of the Court of Inquiry, the limitation would run from the date when the competent authority is to initiate disciplinary action against the said person.

In **BRIG IQBAL SINGH**'s case (supra), a Division Bench of High Court of Delhi held as under:

> "81. The plea of a trial being barred by limitation goes to the rot of the jurisdiction of the Court Martial. The statute has provided a valuable protection with regard to jurisdictional pleas to persons facing Court Martials. The statute also provides the stage at which the objection is to be taken and the manner in which it is to be proceeded. The same is to be found in Army Rule 53 which reads as hereunder:-
>
> **53. Plea in bar—**(1) The accused, at the time of his general plea of 'Guilty' or 'Not Guilty' to a charge for an offence, may offer a plea in bar of trial on the ground that—
>
> (a) he has been previously convicted or acquitted of the offence by a competent criminal Court or by a Court-Martial, or has been dealt with summarily under Sections 80, 83, 84 and 85,

as the case may be, for the offence, or that a charge in respect of the offence has been dismissed as provided in sub-rule (2) of Rule 22 or

(b) the offence has been pardoned or condoned by competent military authority;

(c) the period of limitation for trial as laid down in Section 122 has expired;

(2) If he offers such plea in bar, the Court shall record it as well as his general plea, and if it considers that any fact or facts stated by him are sufficient to support the plea in bar, it shall receive any evidence offered, and hear any address made by or on behalf of the accused and the prosecutor in reference to the plea.

(3) If the Court finds that the plea in bar is proved, it shall record its finding and notify it to the confirming authority, and shall either adjourn, or if there is any other charge against the accused, whether in the same or in a different charge-sheet, which is not affected by the plea in bar, may proceed to the trial of the accused on that charge.

(4) If the finding that the plea in bar is proved is not confirmed, the Court may be re-assembled by the confirming authority, and proceed as if the plea has been found not proved.

(5) If the Court finds that the plea in bar is not proved, it shall proceed with the trial, and the said findings shall be subject to confirmation like any other finding of the Court.

82. Army Rule 53(1)(c) did not exist on the statute book and has been introduced by the amendment to the rules on 6th December,1993. The legislature, in its wisdom has, therefore, taken into consideration that the limitation for trial laid down in Section 122 is a question of fact and law and goes to the root of the matter i.e., amounts to questioning the very jurisdiction of subjecting a person to trial by Court Martial. Consequently, Army Rule 53(2)(4) provides that as soon as such a plea in bar to the trial is offered, the Court Martial shall receive any evidence offered in support of the plea and also hear any address made on behalf of the accused and the prosecutor in reference to such plea.

83. After receipt of the report of the Court of Inquiry and recording of the summary of evidence, the competent authority had directed that the petitioner be tried by the General Court Martial. The stage of recording of the general plea on behalf of the petitioner as well as a plea in bar to the jurisdiction of the Court Martial on account of the trial being barred by limitation or otherwise has yet to come. It is at this stage that the petitioner would plead the bar to trial of

limitation, if available, and lead such evidence in accordance with law as is permissible. It has been so held even in the judicial pronouncements cited therefore which we are bound.

84. It is settled principle of law that where the statute mandates a particular thing to be done in a particular manner, it must necessarily be done in such manner…..……..

85. In the instant case, the statute lays down the method and manner in which plea of bar of jurisdiction on account of limitation is to be taken and the statute itself provides the procedure to be followed by the Court Martial when such a plea is taken. That stage for the petitioner is yet to arrive in the instant case. The plea at the face of it requires evidence. The petitioner cannot pre-empt either the stage or the adjudication by the authority, tribunal or forum, statutorily created for adjudication of such a plea by virtue of taking recourse to the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India."

I have given my earnest consideration to the respective submissions made by the learned counsel on either side and perused all the material made available on record.

Before going into the merits of the case, it is relevant to notice Section 122 of the Army Act and Rule 53 of the Army Rules, which read as under:

Section 122 of the Army Act:

"**122. Period of limitation for trial:-** (1) Except as provided by sub-section (2), no trial by court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years and such period shall commence,--

(a) on the date of the offence; or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or

(c) where it is now known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority

competent to initiate action, whichever is earlier.

(2) The provisions of sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in Section 89.

(3) In the computation of the period of time mentioned in sub-section (1), any time spent by such person as a prisoner of war, or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded.

(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army.

Rule 53:

"**53. Plea in bar—**(1) The accused, at the time of his general plea of 'Guilty' or 'Not Guilty' to a charge for an offence, may offer a plea in bar of trial on the ground that—

(a) he has been previously convicted or acquitted of the offence by a competent criminal Court or by a court-martial, or has been dealt with summarily under Sections 80, 83, 84 and 85, as the case may be, for the offence, or that a charge in respect of the offence has been dismissed as provided in sub-rule (2) of Rule 22; or
(b) the offence has been pardoned or condoned by competent military authority;
(c) the period of limitation for trial as laid down in Section 122 has expired;

(2) If he offers such plea in bar, the court shall record it as well as his general plea, and if it considers that any fact or facts stated by him are sufficient to support the plea in bar, it shall receive any evidence offered, and hear any address made by or on behalf of the accused and the prosecutor in reference to the plea.

(3) If the court finds that the plea in bar is proved, it shall record its finding and notify it to the confirming authority, and shall either adjourn, or if there is any other charge against the accused, whether in the same or in a different charge-sheet, which is not affected by the plea in bar, may proceed to the trial of the accused on that charge.

(4) If the finding that the plea in bar is proved is not

confirmed, the court may be re-assembled by the confirming authority, and proceed as if the plea has been found not proved.

(5) If the court finds that the plea in bar is not proved, it shall proceed with the trial, and the said findings shall be subject to confirmation like any other finding of the Court."

Further, it appears, when a doubt had arisen as to period of limitation, the date from which it is to be reckoned, the Additional Directorate General, Discipline and Vigilance, Adjutant General's Branch, Army Headquarters, DHQ PO, New Delhi gave a clarification, in this regard, on 2-4-2001. Paragraphs 4 and 8 of the said letter read as under:

"4. A close scrutiny of the aforementioned provisions reveals that the statutory period of limitation, prescribed vide the Section ibid reckons from the earliest date on which the aggrieved person or the authority competent to initiate action comes to know, firstly, the nature of the offence committed and, secondly, the identity of the offender. Thus, the period of limitation will commence:-

Clause (a) ibid, on the date of the commission of the offence: provided on that date there is knowledge both of the offence and the identity of the offender. To put it slightly differently, clause (a) will not apply, if, on the date of the commission of the offence, either the offence, as such, or the identity of the offender is not known.

(b) Under clause (b) ibid, "on the first day on which the offence comes to the knowledge of the person aggrieved thereby or of the authority competent to initiate action, whichever is earlier", if, on that date itself the identity of the offender is also known. Clause (b) will not apply, if on the date specified therein, though there is knowledge of the commission of the offence, there is no knowledge of the identity of the offender, i.e. though the offence is known, the offender is not known."

(c) Under clause (c) ibid, "on the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier". Clause (c) pre-supposes knowledge of the offence.

(d) In case where the nature of offence or identity of

> the offender(s) are revealed only after investigation by a Court of Inquiry, which is finalized with the direction of competent authority thereon, period of limitation shall commence from the date of endorsement of direction of the competent authority on the Court of Inquiry.
>
> **8. <u>Authority competent to initiate action</u>.** The process of disciplinary action under the Army Act, as is well known, commences with hearing of the charge, in terms of AR 22 by the CO of the offender. Therefore, the CO certainly would constitute "**authority competent to initiate action"** envisaged in Sec.122. Undoubtedly, he cannot be said to be the only authority to do so even though, in law, he alone is competent to "hear the charge". The emphasis in the expression "authority competent to initiate action" is clearly on competence to initiate (or direct) action and not mere competence to initiate process of disciplinary action. Hence, an authority vested with the powers to direct initiation of disciplinary action in respect of the particular offender, shall also be included in the above expression. Therefore, in cases where disciplinary action proceeds on the basis of the directions of the competent superior authority, the period of limitation shall reckon from the date such authority acquires requisite knowledge of commission by the accused of the relevant offence and not from the date the CO initiates the process of disciplinary action by hearing the charge in pursuance of such directions."

From Section 122 of the Army Act itself it is clear that no trial by Court Martial of any person subject to the Act for any offence shall be commenced after the expiry of a period of 3 years and such period shall commence on the date of offence. This is not one such case. The case on hand is a case, where the commission of offence came to light on the report made by respondents 8 and 9 saying that their railway warrants were misused by the petitioner. This squarely fits into clause (b) of Section 122, which says that where the commission of offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority,

whichever is earlier. Further, clause (c) says, where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved or to the authority competent to initiate action, whichever is earlier.

But, nonetheless, unless and until the authority competent to initiate action is known and takes a decision in the matter, it cannot be said that the limitation commences. The period of limitation shall be reckoned from the date such authority acquires requisite knowledge of commission of the relevant offence by the accused and not from the date of C.O. initiates the process of disciplinary action by hearing the charge in pursuance of such directions. Unless and until the authority competent to initiate the disciplinary action is satisfied as to the offence made out, worth of trying, on perusal of the report of the Court of Inquiry, the limitation cannot be said to have commenced under Section 122 of the Army Act. In this case, may be, on 8-6-2004, a report was sent stating that respondents 8 and 9 have reported that the petitioner has misused two railway warrants issued in their names etc. But, unless and until the Court of Inquiry is ordered and the Court of Inquiry report is examined by the authority competent, as to whether this is a case requiring for assembling of General Court Martial, it cannot be said that the limitation has commenced. In this case, admittedly, the authority competent had taken a decision, after perusing all the records, including the report dated 8-6-2004 and the Court of Inquiry report dated 18-7-2005 and the assembling of General Court Martial was ordered on 24-5-2007. Therefore, the contention of the learned counsel for the petitioner that the limitation has commenced from the date of report i.e. 23-5-2004 stating that the petitioner had misused two railway warrants relating to respondents 8 and 9 cannot be countenanced. As such, it cannot be said that the

action initiated by the respondents is barred by limitation as per the provisions of Section 122 of the Army Act. The Judgments relied upon by the learned counsel for the petitioner, as noticed above, have no relevance to the facts of this case. The Writ Petition is devoid of any merit and is liable to be dismissed.

Accordingly, the Writ Petition is dismissed. No order as to costs.

21-8-2007

Prk

LR COPIES TO BE MARKED

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[1] AIR 1996 SC 3091

[2] AIR 2001 SC 1772

[3] Mil LJ 2004 Delhi 131

[4] 2007(1) SLR 278